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07 OCT 22 PM 2:01  
RICHARD M. HENNING  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

6 Attorneys for Defendants  
7 JEFFREY A. GIANNINI, ALBERT P. GIANNINI,  
8 JR. and THE GIANNINI LIVING TRUST

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN JOSE DIVISION

12 ROBERT McCARTHY,

13 Plaintiff,

14 v.

15 JEFFREY A. GIANNINI;  
16 ALBERT P. GIANNINI, JR.;  
17 THE GIANNINI LIVING TRUST; and  
18 DOES 1 through 10, inclusive,

19 Defendants.

Case No. **C07 05376**

**PVT**

**NOTICE TO FEDERAL COURT OF  
REMOVAL OF CIVIL ACTION  
PURSUANT TO 28 U.S.C. §§ 1331, 1441(b)  
AND 1446 (FEDERAL QUESTION)**

20 TO THE CLERK IN THE ABOVE-ENTITLED COURT AND TO PLAINTIFF  
21 ROBERT McCARTHY AND PLAINTIFF'S ATTORNEY OF RECORD:

22 PLEASE TAKE NOTICE THAT Defendants, Jeffrey A. Giannini, Albert P. Giannini  
23 and The Giannini Living Trust (hereinafter "Defendants") hereby give Notice of Removal of the  
24 above-entitled action from the Santa Clara County Superior Court to the United States District Court  
25 for the Northern District of California, San Jose Division, and state as follows:

26 1. This action was commenced on August 27, 2007, by the Complaint filed in  
27 the Superior Court for the County of Santa Clara, entitled *Robert McCarthy v. Jeffrey A. Giannini*;

28  
**NOTICE TO FEDERAL COURT OF  
REMOVAL OF CIVIL ACTION**

1 *Albert P. Giannini, Jr.; The Giannini Living Trust; and Does 1 through 10* (hereinafter “the  
2 Complaint”).

3 2. Without waiving any or all objections Defendants may have regarding the  
4 effectiveness of service of process, Defendants first received copies of the Complaint on October 8,  
5 2007. A true and correct copy of the Summons and Complaint is attached hereto as Exhibit A.

6 3. On October 22, 2007, Defendants filed an Answer to the Complaint in the  
7 Superior Court for the County of Santa Clara. A true and correct copy of the Answer is attached  
8 hereto as Exhibit B.

9 4. No further proceedings have been heard at the Superior Court for the County  
10 of Santa Clara.

11 5. The instant Notice of Removal is timely filed as it is within thirty (30) days of  
12 the date of receipt of the initial pleading pursuant to 28 U.S.C. § 1446(b).

13 6. A copy of this Notice of Removal will be filed with the Clerk for the Superior  
14 Court of the State of California for Santa Clara County and served upon all parties as required by 28  
15 U.S.C. § 1446(d).

16 **JURISDICTION**

17 7. This is a suit of a wholly civil nature brought in a California court. The action  
18 is now pending in Santa Clara County, California. Venue is proper in this Court pursuant to 28  
19 U.S.C. §§ 84(a), 1391 and 1446. This case may be removed to this Court by Defendants pursuant to  
20 the provisions of 28 U.S.C. § 1441(b) as a result of the existence of original jurisdiction based on  
21 federal question.

22 **INTRADISTRICT ASSIGNMENT**

23 8. All civil actions that arise in the county of Santa Clara shall be assigned to the  
24 San Jose Division. Northern District Civil Local Rule 3-2(c) and (e); 3-5(b). Further, assignment in  
25 the San Jose Division is proper because a substantial part of the events or omissions giving rise to  
26 the claim occurred and a substantial part of property that is the subject of the action is situated in the  
27 County of Santa Clara, California. Northern District Civil Local Rule 3-2(c) and (e).

**FEDERAL QUESTION**

9. Defendants are the owners, operators, and/or lessors of the real property located at 1014 West El Camino Real, Sunnyvale, California, 94087.

10. Upon information and belief, Plaintiff ROBERT McCARTHY (hereinafter "Plaintiff"), a disabled person, attempted to patronize Cranberry Hill Mercantile and Stamp On Over located at 1014 West El Camino Real, Sunnyvale, California, 94087 in the year of 2007. Plaintiff claims that he was unable and/or had difficulty patronizing the businesses because the businesses' facilities were allegedly inaccessible. Plaintiff alleges that the businesses were inaccessible because the subject facilities do not comply with the ADA Access Guidelines for Building and Facilities. As a result, Plaintiff filed the Complaint. The Complaint alleges the following causes of action: (1) denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act; (2) denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and discrimination in violation of the California Unruh Act; and (3) violation of the California Business and Professions Code.

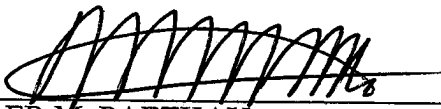
11. Because Plaintiff alleges that Defendants denied him access to public accommodations in violation of the Americans with Disabilities Act, a federal statute, this action is a civil action arising under the laws of the United States of which this Court has original jurisdiction over pursuant to 28 U.S.C. § 1331. Defendants may remove this action to this Court pursuant to 28 U.S.C. §§ 1441(b) and 1446 because of the existence of original jurisdiction based on federal question. With respect to Plaintiff's California state law causes of action, these causes of action are removable pursuant to this Court's supplemental jurisdiction under 28 U.S.C. § 1367 because they are so related to the federal causes of action that they form part of the same case or controversy. Thus, this action is removable in its entirety.

12. Contemporaneously with the filing of this Notice of Removal in the United States District Court for the Northern District of California, Defendants will file a Notice of Removal to Federal Court to Plaintiff, Plaintiff's Counsel and State Court (with its attachments) with

1 the Clerk of the Superior Court for the County of Santa Clara. A true and correct of said Notice  
2 without attachments is attached hereto as Exhibit C.

3 Wherefore, having provided notice as is required by law, the above-entitled action  
4 should be removed from the Superior Court for the County of Santa Clara to this Court.  
5

6 Dated: October 22, 2007

7   
8 TYLER M. PAETKAU  
9 LITTLER MENDELSON  
10 A Professional Corporation  
11 Attorneys for Defendants  
12 JEFFREY A. GIANNINI, ALBERT P.  
13 GIANNINI, JR. and THE GIANNINI LIVING  
14 TRUST  
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# **EXHIBIT A**

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# SUMMONS (CITACION JUDICIAL)

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

JEFFREY A. GIANNINI; ALBERT P. GIANNINI, JR.; THE  
GIANNINI LIVING TRUST; AND DOES 1 THROUGH 10

## YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

ROBERT MCCARTHY

SUM-100

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

ENDORSED

2007 AUG 27 P 2:04

J. Cao-Nguyen  
DEPUTY CLERK

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto al dearse que procesan su caso en la corte. Es posible que haya un formulario que usted puede usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:  
(El nombre y dirección de la corte es):

Superior Court of California, Santa Clara County, 191 N. First Street,  
San Jose CA 95113

CASE NUMBER  
(Número del Caso): CV 09 30 18

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:  
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Kiri Torro

Chief Executive Office, .....

Clerk, by  
(Secretario)

J. Cao-Nguyen

Deputy  
(Adjunto)

DATE:

(Fecha) AUG 27 2007

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)  
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

### NOTICE TO THE PERSON SERVED: You are served

- ☒ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):

- ☐ on behalf of (specify):

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)  
☐ other (specify):

- ☐ by personal delivery on (date):

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CM-010

FOR COURT USE ONLY

ENCLOSURE

2007 AUG 27 P 2:04

J. Cao-Nguyen  
DEPUTY CLERK

CASE NAME: McCarthy v JEFFREY A. GIANNINI, et. al.

CASE NUMBER: 107 CV 093018

JUDGE:

DEPT:

**CIVIL CASE COVER SHEET**

☒ Unlimited (Amount demanded exceeds \$25,000) ☐ Limited (Amount demanded is \$25,000 or less)

**Complex Case Designation**

☐ Counter ☐ Joinder

Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

<p><b>Auto Tort</b></p> <p><input type="checkbox"/> Auto (22)</p> <p><input type="checkbox"/> Uninsured motorist (46)</p> <p><b>Other P/DP/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b></p> <p><input type="checkbox"/> Asbestos (04)</p> <p><input type="checkbox"/> Product liability (24)</p> <p><input type="checkbox"/> Medical malpractice (45)</p> <p><input type="checkbox"/> Other P/DP/WD (23)</p> <p><b>Non-P/DP/WD (Other) Tort</b></p> <p><input type="checkbox"/> Business tort/unfair business practice (07)</p> <p><input checked="" type="checkbox"/> Civil rights (08)</p> <p><input type="checkbox"/> Defamation (13)</p> <p><input type="checkbox"/> Fraud (18)</p> <p><input type="checkbox"/> Intellectual property (19)</p> <p><input type="checkbox"/> Professional negligence (26)</p> <p><input type="checkbox"/> Other non-P/DP/WD tort (35)</p> <p><b>Employment</b></p> <p><input type="checkbox"/> Wrongful termination (38)</p> <p><input type="checkbox"/> Other employment (15)</p>	<p><b>Contract</b></p> <p><input type="checkbox"/> Breach of contract/warranty (06)</p> <p><input type="checkbox"/> Rule 3.740 collections (09)</p> <p><input type="checkbox"/> Other collections (09)</p> <p><input type="checkbox"/> Insurance coverage (18)</p> <p><input type="checkbox"/> Other contract (37)</p> <p><b>Real Property</b></p> <p><input type="checkbox"/> Eminent domain/inverse condemnation (14)</p> <p><input type="checkbox"/> Wrongful eviction (33)</p> <p><input type="checkbox"/> Other real property (28)</p> <p><b>Unlawful Detainer</b></p> <p><input type="checkbox"/> Commercial (31)</p> <p><input type="checkbox"/> Residential (32)</p> <p><input type="checkbox"/> Drugs (38)</p> <p><b>Judicial Review</b></p> <p><input type="checkbox"/> Asset forfeiture (05)</p> <p><input type="checkbox"/> Petition re: arbitration award (11)</p> <p><input type="checkbox"/> Writ of mandate (02)</p> <p><input type="checkbox"/> Other judicial review (39)</p>	<p><b>Provisionally Complex Civil Litigation</b> (Cal. Rules of Court, rules 3.400-3.403)</p> <p><input type="checkbox"/> Antitrust/Trade regulation (03)</p> <p><input type="checkbox"/> Construction defect (10)</p> <p><input type="checkbox"/> Mass tort (40)</p> <p><input type="checkbox"/> Securities litigation (28)</p> <p><input type="checkbox"/> Environmental/Toxic tort (30)</p> <p><input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)</p> <p><b>Enforcement of Judgment</b></p> <p><input type="checkbox"/> Enforcement of judgment (20)</p> <p><b>Miscellaneous Civil Complaint</b></p> <p><input type="checkbox"/> RICO (27)</p> <p><input type="checkbox"/> Other complaint (not specified above) (42)</p> <p><b>Miscellaneous Civil Petition</b></p> <p><input type="checkbox"/> Partnership and corporate governance (21)</p> <p><input type="checkbox"/> Other petition (not specified above) (43)</p>
--	---	---

2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. ☐ Large number of separately represented parties

b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve

c. ☐ Substantial amount of documentary evidence

d. ☐ Large number of witnesses

e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court

f. ☐ Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☒ punitive

4. Number of causes of action (specify):

5. This case ☐ is ☒ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 8-23-2007

David C. Wakefield

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

- NOTICE**
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 3.30, 3.220, 3.400-3.403, 3.740;  
Cal. Standards of Judicial Administration, vol. 1.10  
www.courtinfo.ca.gov



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FAX NO. 6192995099

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**PINNOCK & WAKEFIELD**

A Professional Corporation

David C. Wakefield, Esq. Bar #: 185736

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San Diego, CA 92103

Telephone: 619.858.3671

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Attorneys for Plaintiffs

2007 AUG 27 P 2: 04

J. Cao-Nguyen  
DEPUTY CLERK**SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA****ROBERT McCARTHY,**

Plaintiff,

v.

**JEFFREY A. GIANNINI; ALBERT P.  
GIANNINI, JR.; THE GIANNINI  
LIVING TRUST; AND DOES 1  
THROUGH 10, Inclusive,  
Defendants.**Case No.: **107 CV 093018****COMPLAINT****DISCRIMINATORY PRACTICES IN  
PUBLIC ACCOMMODATIONS****[42 U.S.C. 12182(a) ET. SEQ; CA CIVIL  
CODE 51, 52, 54, 54.1, 54.3; CA  
HEALTH & SAFETY CODE § 19955;  
CA BUSINESS & PROFESSIONS Code  
§ 17200 ]****DEMAND FOR JURY TRIAL****[F.R.Civ.P. rule 38(b)]****UNLIMITED CIVIL CASE - AMOUNT  
DEMANDED EXCEEDS \$25,000.00;  
PERMANENT INJUNCTIVE RELIEF****INTRODUCTION**

1. Plaintiff ROBERT McCARTHY herein complains, by filing this Civil Complaint in accordance with rules of Civil Procedure in the Superior Court For The State Of California, that Defendants have in the past, and presently are, engaging in discriminatory practices against

**COMPLAINT  
CASE #**



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1 individuals with disabilities. Plaintiff alleges this civil action and others substantial similar thereto  
2 are necessary to compel access compliance because empirical research on the effectiveness of Title  
3 III of the Americans with Disabilities Act indicates this Title has failed to achieve full and equal  
4 access simply by the executive branches of the Government funding and promoting voluntary  
5 compliance efforts. Further, empirical research shows when individuals with disabilities give  
6 actual notice of potential access problems to places of public accommodation without a civil rights  
7 action, the public accommodations do not remove the access barriers. Therefore, Plaintiff makes  
8 the following allegations in this federal civil rights action:

9 2. The property that is the subject of this action is located in Santa Clara County.

10 3. Venue is proper in Santa Clara County because a substantial part of Plaintiffs' claims arose  
11 within Santa Clara County and the property that is the subject of this action is situated in Santa  
12 Clara County.

13  
14 **NAMED DEFENDANTS AND NAMED PLAINTIFF**

15 4. Defendants are, and, at all times mentioned herein, were, a business or corporation or  
16 franchise organized and existing and/or doing business under the laws of the State of California.  
17 Plaintiff is informed and believes and thereon alleges that Defendants JEFFREY A. GIANNINI;  
18 ALBERT P. GIANNINI, JR.; and THE GIANNINI LIVING TRUST are the owners, operators,  
19 and/or lessors of the real property located at 1014 West El Camino Real, Sunnyvale, California,  
20 94087, Assessor Parcel Number 198-26-009. Defendants JEFFREY A. GIANNINI; ALBERT P.  
21 GIANNINI, JR.; and THE GIANNINI LIVING TRUST are located at 4530 Engle Lake Drive, Fort  
22 Collins, CO, 80524, and at 56 Edgehill Way, San Francisco, California, 94127.

23 5. The words Plaintiffs and Plaintiff as used herein specifically include ROBERT  
24 McCARTHY.

25 6. Defendants Does 1 through 10, were at all times relevant herein subsidiaries, employers,  
26 employees, agents, of JEFFREY A. GIANNINI; ALBERT P. GIANNINI, JR.; and/or THE  
27 GIANNINI LIVING TRUST. Plaintiff is ignorant of the true names and capacities of Defendants  
28

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sued herein as Does 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will pray leave of the court to amend this complaint to allege the true names and capacities of the Does when ascertained.

7. Plaintiff is informed and believes, and thereon alleges, that Defendants and each of them herein were, at all times relevant to the action, the owner, lessor, lessee, franchiser, franchisee, general partner, limited partner, agent, employee, representing partner, or joint venturer of the remaining Defendants and were acting within the course and scope of that relationship. Plaintiff is further informed and believes, and thereon alleges, that each of the Defendants herein gave consent to, ratified, and/or authorized the acts alleged herein to each of the remaining Defendants.

#### CONCISE SET OF FACTS

8. Plaintiff ROBERT MCCARTHY (hereinafter "MCCARTHY") has physical impairments and due to these impairments he has learned to successfully operate a wheelchair for mobility. Plaintiff MCCARTHY said physical impairments substantially limit one or more of the following major life activities including but not limited to: walking.

9. In year 2007, Plaintiff MCCARTHY went to Defendants' public accommodation facilities known as CRANBERRY HILL MERCANTILE (hereinafter "CRANBERRY HILL MERCANTILE") and STAMP ON OVER (hereinafter "STAMP ON OVER") located at 1014 West El Camino Real, Sunnyvale, California, 94087, Assessor Parcel Number 198-26-009 (hereinafter "property"), to utilize their goods and/or services accompanied by a friend. When Plaintiff MCCARTHY patronized Defendants' facilities, he was unable to use and/or had difficulty using the public accommodations' facilities including but not limited to the disabled parking, exterior path of travel, entrance, and customer service counter facilities were not accessible because said facilities they failed to comply with ADA Access Guidelines For Buildings and Facilities (hereafter referred to as "ADAAG" and codified in 28 C.F.R. Part 36, App. A) and/or California's Title 24 Building Code Requirements. Defendants failed to remove barriers to equal access at their public accommodation facilities located at the property.

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10. Plaintiff MCCARTHY personally experienced difficulty with said access barriers at the subject property. The following examples of known barriers to access are not an exhaustive list of the barriers to access that exist at Defendants' facilities. For example, there are parking facilities serving this establishment at both the front and the rear of the establishment. There fails to be any of the required disability signage at the property informing patrons they may be fined or their vehicle may be towed if they unlawfully park in a disabled parking space anywhere on the property. The parking facilities completely fail to have any of the required "Van Accessible" disabled parking spaces. There are a total of twenty-six (26) parking spaces within the establishment's parking facilities, two (2) of which are designated disabled parking spaces located in the front of the establishment to the far right side. If an establishment has between twenty-six (26) and fifty (50) parking spaces in the parking facilities, the establishment must have two (2) designated disabled parking spaces, one (1) of which must be a "Van Accessible" disabled parking space. Plaintiff MCCARTHY drives an accessible van with a deployable lift. As the establishment fails to have any of the required "Van Accessible" disabled parking, Plaintiff MCCARTHY was precluded from parking in either of the designated disabled parking space. As a result, Plaintiff MCCARTHY parked his accessible van in the rear of the establishment.

11. There fails to be a designated safe and accessible exterior path of travel through the alley to the front of the building in which the establishment is located. As a result, Plaintiff MCCARTHY was forced to traverse through the parking lot, behind parked vehicles other than his own to reach the curb cut at the designated disabled parking spaces. Additionally, there fails to be a designated safe and accessible exterior path of travel leading from the public sidewalk to the sidewalk serving the front entrance of the establishment.

12. The front entrance door fails to be accessible, as the entrance door fails to have the required smooth and uninterrupted surface on the bottom ten inches (10") of the door that allows the door to be opened with a wheelchair footrest without creating a hazard. This is due to the fact that this door is comprised of a glass door in a metal frame that also has a low four inch (4") bottom rail. The front entrance fails to have the required disability signage.

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13. The customer service counter where patrons purchase their selections fails to be accessible. as the counter is too high to be accessible. This counter is mounted forty-two inches (42") high.

14. Plaintiff can prove these barriers as Plaintiff conducted a preliminary survey of Defendants' facility. Plaintiff specifically alleges that Defendants knew, to a substantial certainty, that the architectural barriers precluded wheelchair access. First, Plaintiff will prove that Defendants had actual knowledge that the architectural barriers precluded wheelchair access and that the noncompliance with ADAAG as to accessible entrances was intentional. Second, due to the abundance of ADA information and constant news covers of ADA lawsuits, Defendants had actual knowledge of the ADA and decided deliberately not to remove architectural barriers. Third, Defendants have no plans to remodel. Fourth, Defendants had actual knowledge of ADA given all the ADA public awareness campaigns, the abundance of free ADA information and the media's constant ADA coverage. Fifth, a human being acting for the defendants made a conscious decision as to how to proceed given the presence of the architectural barriers. Plaintiff alleges any alternative methods preclude integration of wheelchair patrons, as it requires them to use a second-class entrance. Also, expert testimony will show the facility contained inaccessible features. Plaintiff alleges businesses often state that they have few customers with disabilities. Plaintiff alleges such customers avoid patronizing inaccessible businesses and are deterred from patronizing such businesses.

15. Plaintiff MCCARTHY intends to return to Defendants' public accommodation facilities in the immediate future. Plaintiff MCCARTHY is presently deterred from returning due to their knowledge of the barriers to access that exist at Defendants' facilities.

16. Pursuant to federal and state law, Defendants are required to remove barriers to their existing facilities. Further, Defendants had actual knowledge of their barrier removal duties under the Americans with Disabilities Act and the Civil Code before January 26, 1992. Also, Defendants should have known that individuals with disabilities are not required to give notice to a governmental agency before filing suit alleging Defendants failed to remove architectural barriers.

17. Plaintiff believes and herein alleges Defendants' facilities have access violations not directly

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1 experienced by Plaintiff MCCARTHY which would preclude or limit access by MCCARTHY and  
 2 other persons with disabilities, potentially including but not limited to violations of the ADA, ADA  
 3 Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A) and Title 24 of the California  
 4 Building Code. Plaintiff alleges Defendants are required to utilize the ADA checklist for Readily  
 5 Achievable Barrier Removal approved by the United States Department of Justice and created by  
 6 Adaptive Environments.

7 18. Based on these facts, Plaintiff alleges he was discriminated against each time he patronized  
 8 Defendants' facilities. Plaintiff MCCARTHY was extremely upset due to Defendants' conduct.

#### 9 NOTICE

10 19. Plaintiff is not required to provide notice to the defendants prior to filing a complaint.  
 11 *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9<sup>th</sup> Cir 2000).

#### 13 WHAT CLAIMS PLAINTIFF IS ALLEGING AGAINST EACH NAMED DEFENDANT

14 20. JEFFREY A. GIANNINI; ALBERT P. GIANNINI, JR.; THE GIANNINI LIVING TRUST;  
 15 and Does 1 through 10 will be referred to collectively hereinafter as "Defendants."

16 21. Plaintiff aver that the Defendants are liable for the following claims as alleged below:

#### 17 DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS

18 FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS- Claims Under The Americans

#### 19 With Disabilities Act Of 1990

20 CLAIM I AGAINST ALL DEFENDANTS: Denial Of Full And Equal Access

21 22. Based on the facts plead at ¶ 8 - 18 above and elsewhere in this complaint, Plaintiff  
 22 MCCARTHY was denied full and equal access to Defendants' goods, services, facilities, privileges,  
 23 advantages, or accommodations. Plaintiff alleges Defendants are a public accommodation owned,  
 24 leased and/or operated by Defendants. Defendants' existing facilities and/or services failed to  
 25 provide full and equal access to Defendants' facility as required by 42 U.S.C. § 12182(a). Thus,  
 26 Plaintiff MCCARTHY was subjected to discrimination in violation of 42 United States Code  
 27 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff MCCARTHY was denied equal access  
 28

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1 to Defendants' existing facilities.

2 23. Plaintiff ROBERT McCARTHY has physical impairments as alleged in ¶ 9 above because  
3 his conditions affect one or more of the following body systems: neurological, musculoskeletal,  
4 special sense organs, and/or cardiovascular. Further, Plaintiff MCCARTHY said physical  
5 impairments substantially limits one or more of the following major life activities: walking. In  
6 addition, Plaintiff MCCARTHY cannot perform one or more of the said major life activities in the  
7 manner, speed, and duration when compared to the average person. Moreover, Plaintiff  
8 MCCARTHY has a history of or has been classified as having a physical impairment as required by  
9 42 U.S.C. § 12102(2)(A).

10  
11 **CLAIM II AGAINST ALL DEFENDANTS: Failure To Make Alterations In Such A Manner**  
12 **That The Altered Portions Of The Facility Are Readily Accessible And Usable By Individuals**  
13 **With Disabilities**

14 24. Based on the facts plead at ¶¶ 8 - 18 above and elsewhere in this complaint, Plaintiff  
15 ROBERT McCARTHY was denied full and equal access to Defendants' goods, services, facilities,  
16 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or  
17 operated by Defendants. Defendants altered their facility in a manner that affects or could affect the  
18 usability of the facility or a part of the facility after January 26, 1992. In performing the alteration,  
19 Defendants failed to make the alteration in such a manner that, to the maximum extent feasible, the  
20 altered portions of the facility are readily accessible to and usable by individuals with disabilities,  
21 including individuals who use wheelchairs, in violation of 42 U.S.C. §12183(a)(2).

22 25. Additionally, the Defendants undertook an alteration that affects or could affect the usability  
23 of or access to an area of the facility containing a primary function after January 26, 1992.  
24 Defendants further failed to make the alterations in such a manner that, to the maximum extent  
25 feasible, the path of travel to the altered area serving the altered area, are readily accessible to and  
26 usable by individuals with disabilities in violation 42 U.S.C. §12183(a)(2).

27 26. Pursuant to 42 U.S.C. §12183(a), this failure to make the alterations in a manner that, to the  
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1 maximum extent feasible, are readily accessible to and usable by individuals with disabilities  
2 constitutes discrimination for purposes of 42 U.S.C. § 12183(a). Therefore, Defendants  
3 discriminated against Plaintiff in violation of 42 U.S.C. § 12182(a).

4 27. Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination in violation of 42  
5 U.S.C. § 12183(a), 42 U.S.C. § 12182(a) and 42 U.S.C. § 12188 because Plaintiff ROBERT  
6 McCARTHY was denied equal access to Defendants' existing facilities.

7  
8 **CLAIM III AGAINST ALL DEFENDANTS: Failure To Remove Architectural Barriers**

9 28. Based on the facts plead at ¶¶ 8 - 18 above and elsewhere in this complaint, Plaintiff  
10 ROBERT McCARTHY was denied full and equal access to Defendants' goods, services, facilities,  
11 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or  
12 operated by Defendants. Defendants failed to remove barriers as required by 42 U.S.C. § 12182(a).  
13 Plaintiff is informed, believes, and thus alleges that architectural barriers which are structural in  
14 nature exist within the physical elements of Defendants' facilities in violation of Americans With  
15 Disabilities Act Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A; hereinafter  
16 "ADAAG") and Title 24 of the California Building Code. Title III requires places of public  
17 accommodation to remove architectural barriers that are structural in nature to existing facilities.  
18 [See, 42 United States Code 12182(b)(2)(A)(iv).] Failure to remove such barriers and disparate  
19 treatment against a person who has a known association with a person with a disability are forms of  
20 discrimination. [See 42 United States Code 12182(b)(2)(A)(iv).] Thus, Plaintiff ROBERT  
21 McCARTHY was subjected to discrimination in violation of 42 United States Code  
22 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because he was denied equal access to Defendants'  
23 existing facilities.

24  
25 **CLAIM IV AGAINST ALL DEFENDANTS: Failure To Modify Practices, Policies And**  
26 **Procedures**

27 29. Based on the facts plead at ¶¶ 8 - 18 above and elsewhere in this complaint, Defendants  
28



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1 failed and refused to provide a reasonable alternative by modifying its practices, policies and  
2 procedures in that they failed to have a scheme, plan, or design to assist Plaintiff and/or others  
3 similarly situated in entering and utilizing Defendants' services, as required by 42 U.S.C. §  
4 12188(a). Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of  
5 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT  
6 MCCARTHY was denied equal access to Defendants' existing facilities.

7 30. Based on the facts plead at ¶ 8 - 18 above, Claims I, II, and III of Plaintiffs' First Cause Of  
8 Action above, and the facts elsewhere herein this complaint, Plaintiff will suffer irreparable harm  
9 unless Defendants are ordered to remove architectural, non-architectural, and communication  
10 barriers at Defendants' public accommodation. Plaintiff alleges that Defendants' discriminatory  
11 conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiff and a  
12 substantial segment of the disability community. Plaintiff alleges there is a national public interest  
13 in requiring accessibility in places of public accommodation. Plaintiff has no adequate remedy at  
14 law to redress the discriminatory conduct of Defendants. Plaintiff desires to return to Defendants'  
15 places of business in the immediate future. Accordingly, the Plaintiff alleges that a structural or  
16 mandatory injunction is necessary to enjoin compliance with federal civil rights laws enacted for  
17 the benefit of individuals with disabilities.

18 31. WHEREFORE, Plaintiff prays for judgment and relief as hereinafter set forth.

20 SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS - CLAIMS UNDER  
21 CALIFORNIA ACCESSIBILITY LAWS

22 CLAIM I: Denial Of Full And Equal Access

23 32. Based on the facts plead at ¶ 8 - 18 above and elsewhere in this complaint, Plaintiff  
24 ROBERT MCCARTHY was denied full and equal access to Defendants' goods, services, facilities,  
25 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or  
26 operated by Defendants as required by Civil Code Sections 54 and 54.1. Defendants' facility  
27 violated California's Title 24 Accessible Building Code by failing to provide equal access to  
28

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1 Defendants' facilities.

2 33. These violations denied Plaintiff ROBERT McCARTHY full and equal access to  
3 Defendants' facility. Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination  
4 pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff ROBERT McCARTHY was denied  
5 full, equal and safe access to Defendants' facility, causing severe emotional distress.

6 **CLAIM II: Failure To Modify Practices, Policies And Procedures**

7 34. Based on the facts plead at ¶¶ 8 - 18 above and elsewhere herein this complaint, Defendants  
8 failed and refused to provide a reasonable alternative by modifying its practices, policies, and  
9 procedures in that they failed to have a scheme, plan, or design to assist Plaintiff and/or others  
10 similarly situated in entering and utilizing Defendants' services as required by Civil Code § 54.1.  
11 Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination in violation of Civil Code §  
12 54.1.

13 **CLAIM III: Violation Of The Unruh Act**

14 35. Based on the facts plead at ¶¶ 8 - 18 above and elsewhere herein this complaint and because  
15 Defendants violated the Civil Code § 51 by failing to comply with 42 United States Code §  
16 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did and continue to discriminate  
17 against Plaintiff and persons similarly situated in violation of Civil Code §§ 51, 52, and 54.1.

18 36. Based on the facts plead at ¶¶ 8 - 18 above, Claims I, II, and III of Plaintiffs' Second Cause  
19 Of Action above, and the facts elsewhere herein this complaint, Plaintiff will suffer irreparable  
20 harm unless Defendants are ordered to remove architectural, non-architectural, and communication  
21 barriers at Defendants' public accommodation. Plaintiff alleges that Defendants' discriminatory  
22 conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiff and a  
23 substantial segment of the disability community. Plaintiff alleges there is a state and national  
24 public interest in requiring accessibility in places of public accommodation. Plaintiff has no  
25 adequate remedy at law to redress the discriminatory conduct of Defendants. Plaintiff desires to  
26 return to Defendants' places of business in the immediate future. Accordingly, the Plaintiff alleges  
27 that a structural or mandatory injunction is necessary to enjoin compliance with state civil rights  
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1 laws enacted for the benefit of individuals with disabilities.

2 37. Wherefore, Plaintiff prays for damages and relief as hereinafter stated.

3  
4 **Treble Damages Pursuant To Claims I, II, III Under The California Accessibility Laws**

5 38. Defendants, each of them respectively, at times prior to and including the day Plaintiff  
6 patronized Defendants' facilities, and continuing to the present time, knew that persons with  
7 physical disabilities were denied their rights of equal access to all portions of this public facility.  
8 Despite such knowledge, Defendants, and each of them, failed and refused to take steps to comply  
9 with the applicable access statutes; and despite knowledge of the resulting problems and denial of  
10 civil rights thereby suffered by Plaintiff and other similarly situated persons with disabilities.  
11 Defendants, and each of them, have failed and refused to take action to grant full and equal access  
12 to persons with physical disabilities in the respects complained of hereinabove. Defendants, and  
13 each of them, have carried out a course of conduct of refusing to respond to, or correct complaints  
14 about, denial of disabled access and have refused to comply with their legal obligations to make  
15 Defendants' public accommodation facilities accessible pursuant to the Americans With Disability  
16 Act Access Guidelines (ADAAG) and Title 24 of the California Code of Regulations (also known  
17 as the California Building Code). Such actions and continuing course of conduct by Defendants,  
18 and each of them, evidence despicable conduct in conscious disregard of the rights and/or safety of  
19 Plaintiff and of other similarly situated persons, justifying an award of treble damages pursuant to  
20 sections 52(a) and 54.3(a) of the California Civil Code.

21 39. Defendants, and each of their actions have also been oppressive to persons with physical  
22 disabilities and of other members of the public, and have evidenced actual or implied malicious  
23 intent toward those members of the public, such as Plaintiff and other persons with physical  
24 disabilities who have been denied the proper access to which they are entitled by law. Further,  
25 Defendants, and each of their, refusals on a day-to-day basis to correct these problems evidence  
26 despicable conduct in conscious disregard for the rights of Plaintiff and other members of the  
27 public with physical disabilities.  
28

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40. Plaintiff prays for an award of treble damages against Defendants, and each of them, pursuant to California Civil Code sections 52(a) and 54.3(a), in an amount sufficient to make a more profound example of Defendants and encourage owners, lessors/lessees, and operators of other public facilities from willful disregard of the rights of persons with disabilities. Plaintiff does not know the financial worth of Defendants, or the amount of damages sufficient to accomplish the public purposes of section 52(a) of the California Civil Code and section 54.3 of the California Civil Code.

41. Wherefore, Plaintiff prays for damages and relief as hereinafter stated.

**THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS - Violation of Business and Professions Code section 17200 et seq.**

42. Plaintiff incorporates by reference herein the facts plead at ¶ 8-18 above and elsewhere in this complaint.

43. Pursuant to federal law, Defendants are required to remove barriers to their existing facilities. Title III of the Americans With Disabilities Act requires places of public accommodation to remove architectural barriers that are structural in nature to existing facilities. [42 United States Code 12182(b)(2)(A)(iv).] Failure to remove such barriers and disparate treatment against a person who has a known association with a person with a disability are forms of discrimination. [See 42 United States Code 12182(b)(2)(A)(iv).] Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT MCCARTHY was denied equal access to Defendants' existing facilities. Also, Defendants' facilities failed to provide full and equal access to Defendants' facility as required by 42 U.S.C. § 12182(a). Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT MCCARTHY was denied equal access to Defendants' existing facilities. Additionally, as a result of said access barriers, Defendants failed and refused to provide a reasonable alternative by modifying its practices, policies and procedures in that they failed to

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1 have a scheme, plan, or design to assist Plaintiff ROBERT MCCARTHY and/or others similarly  
2 situated in entering and utilizing Defendants' services, as required by 42 U.S.C. § 12188(a). Thus,  
3 Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of 42 United States  
4 Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff was denied equal access to  
5 Defendants' existing facilities.

6 44. Pursuant to state law, Defendants are also required to remove barriers to their existing  
7 facilities. These violations denied Plaintiff ROBERT MCCARTHY full and equal access to  
8 Defendants' facilities. Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination  
9 pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff was denied full, equal and safe access  
10 to Defendants' facility. Further, Defendants' facility, and other goods, services, and/or facilities  
11 provided to the public by Defendants are not accessible to and usable by persons with disabilities as  
12 required by Health and Safety Code § 19955 which requires private entities to make their facility  
13 accessible before and after remodeling, and to remove architectural barriers on and after AB 1077  
14 went into effect. Additionally, Defendants failed and refused to provide a reasonable alternative by  
15 modifying its practices, policies, and procedures in that they failed to have a scheme, plan, or  
16 design to assist Plaintiff ROBERT MCCARTHY and/or others similarly situated in entering and  
17 utilizing Defendants' services as required by Civil Code § 54.1. Thus, Plaintiff ROBERT  
18 MCCARTHY was subjected to discrimination in violation of Civil Code § 54.1. Also, under the  
19 Unruh Act, Defendants violated the Civil Code § 51 by failing to comply with 42 United States  
20 Code 12182(b)(2)(A)(iv), Defendants did and continue to discriminate against Plaintiff ROBERT  
21 MCCARTHY and persons similarly situated in violation of Civil Code §§ 51, 52, and 54.1.  
22 Further, Defendants had actual knowledge of their barrier removal duties under the Americans with  
23 Disabilities Act, the California Civil Code, and the California Health & Safety Code before January  
24 26, 1992.

25 45. Business and Professions Code section 17200 defines "unfair competition" and prohibited  
26 activities as, "... any unlawful, unfair or fraudulent business act or practice and unfair, deceptive,  
27  
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untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." Defendants' acts and omissions alleged herein are violations of the above-enumerated federal and state statutory requirements and public policy and therefore constitute unfair competition and/or prohibited activities as such violations are *unlawful, unfair or fraudulent business acts or practices*.

Defendants' alleged unlawful, unfair, or fraudulent business acts or practices are specifically prohibited by the specific introductory language of B&P section 17200 that is stated in the conjunctive. Consequently, Plaintiff alleges that Defendants' acts and omissions constitute a violation specifically of this section 17200 of the Business and Professions Code.

46. Title III of the ADA mandates removal of architectural barriers and prohibits disability discrimination. As well, Defendants' facility, and other goods, services, and/or facilities provided to the public by Defendants are not accessible to and usable by persons with disabilities as required by CA Health and Safety Code § 19955 which requires private entities to make their facility accessible before and after remodeling, and to remove architectural barriers on and after AB 1077 went into effect.

47. Plaintiff seeks injunctive relief requiring Defendants to comply with the disabled access laws of the State of California at their facilities.

48. WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

**DEMAND FOR JUDGMENT FOR RELIEF:**

A. For general damages pursuant to Cal. Civil Code §§ 52 or 54.3;

B. For \$4,000 in damages pursuant to Cal. Civil Code § 52 for each and every offense of Civil Code § 51, Title 24 of the California Building Code, ADA, and ADA Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A);

C. In the alternative to the damages pursuant to Cal. Civil Code § 52 in Paragraph B above, for \$1,000 in damages pursuant to Cal. Civil Code § 54.3 for each and every offense of Civil Code § 54.1, Title 24 of the California Building Code, ADA, and ADA Accessibility Guidelines;



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1 D. For injunctive relief pursuant to 42 U.S.C. § 12188(a), CA Business & Professions Code §  
2 17200, and CA Health & Safety Code §19955. Plaintiff requests this Court enjoin Defendants to  
3 remove all architectural and communication barriers in, at, or on their facilities including without  
4 limitation violations of the ADA, ADA Accessibility Guidelines and Title 24 of the California  
5 Building Code;

6 E. For attorneys' fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 12205, Cal. Code of Civil  
7 Procedure §§ 1032 and 1033.5, and Cal. Civil Code §§ 52, 54.3;

8 F. For treble damages pursuant to Cal. Civil Code §§ 52(a) or 54.3(a);

9 G. A Jury Trial and;

10 H. For such other further relief as the court deems proper.

11  
12 Respectfully submitted:

13  
14  
15 Dated: August 23, 2007

PINNOCK & WAKEFIELD, A.P.C.

By: 

DAVID C. WAKEFIELD, ESQ.

Attorneys for Plaintiff



## **EXHIBIT B**

1 TYLER M. PAETKAU, Bar No. 146305  
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3 San Francisco, CA 94108.2693  
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4 Fax No.: 415.399.8490  
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5 Attorneys for Defendants  
6 JEFFREY A. GIANNINI, ALBERT P. GIANNINI,  
JR. and THE GIANNINI LIVING TRUST  
7

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA

10 ROBERT McCARTHY,

11 Plaintiff,

12 v.

13 JEFFREY A. GIANNINI;  
14 ALBERT P. GIANNINI, JR.;  
15 THE GIANNINI LIVING TRUST,  
and DOES 1 through 10, inclusive,

16 Defendants.  
17

Case No. 107CV093018

**DEFENDANTS' ANSWER TO  
PLAINTIFF'S UNVERIFIED  
COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF**

Judge: Hon. Joseph Huber  
Dept. 8  
Trial Date: None Set  
Complaint Filed: August 27, 2007

18  
19 Defendants JEFFREY A. GIANNINI, ALBERT P. GIANNINI, JR and THE  
20 GIANNINI LIVING TRUST (hereinafter "Defendants") answer Plaintiff ROBERT McCARTHY'S  
21 (hereinafter "Plaintiff") unverified Complaint alleging discriminatory practices in public  
22 accommodations in violation of the Americans with Disabilities Act, denial of full and equal access  
23 in violation of California Civil Code and violation of California's Business and Professions Code on  
24 file in the above entitled action as follows:

25 **GENERAL DENIAL**

26 Pursuant to the provisions of the California Code of Civil Procedure section  
27 431.30(d), Defendants deny generally and specifically each and every allegation contained in the  
28 Complaint. In addition, Defendants deny that Plaintiff has sustained, or will sustain, any loss or

ANSWER TO COMPLAINT

Case No. 107CV093018

1 damage in the manner alleged, or otherwise, by reason of any act or omission, or any other conduct  
2 or absence thereof, on the part of Defendants.

### 3 AFFIRMATIVE DEFENSES

4 As separate and distinct affirmative defenses to Plaintiff's unverified Complaint,  
5 Defendants allege as follows:

#### 6 FIRST AFFIRMATIVE DEFENSE—

7 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
8 to make alterations in such a manner that the altered portions of the facility are readily accessible  
9 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
10 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
11 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
12 and policies and procedures in violation of the California Civil Code and for discrimination in  
13 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
14 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
15 ROBERT McCARTHY)

16 Defendants allege that neither the Complaint, nor any cause of action set forth  
17 therein, states facts sufficient to constitute a cause of action against Defendants.

#### 18 SECOND AFFIRMATIVE DEFENSE—

19 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
20 to make alterations in such a manner that the altered portions of the facility are readily accessible  
21 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
22 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
23 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
24 and policies and procedures in violation of the California Civil Code and for discrimination in  
25 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
26 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
27 ROBERT McCARTHY)

28 Defendants allege that Plaintiff's causes of action are barred, in whole or in part, by

all of the applicable statutes of limitation, including, but not limited to, California Code of Civil Procedure Sections 338 and 343 and California Business and Professions Code Section 17208.

**THIRD AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims are barred, in whole or in part, because Plaintiff has not suffered, and will not suffer, irreparable harm as a result of any of the alleged conduct and/or omissions of Defendants.

**FOURTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims for injunctive relief are barred, in whole or in part, because Plaintiff's legal remedies are adequate.

**FIFTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims are barred from any remedy, or certain remedies, under the doctrines of laches, waiver and/or estoppel.

**SIXTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff has failed to mitigate his alleged damages.

**SEVENTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities; failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act,

1 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 2 and policies and procedures in violation of the California Civil Code and for discrimination in  
 3 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 4 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 5 ROBERT McCARTHY)

6 Defendants allege that California Civil Code Sections 51, 52, 54, 54.1 and 54.3 and  
 7 California Health and Safety Code Sections 19955 et seq. do not create a private cause of action for  
 8 damages for alleged discrimination. Civil Code Section 55 provides only a private cause of action to  
 9 enjoin such alleged statutory violations.

10 **EIGHTH AFFIRMATIVE DEFENSE—**

11 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 12 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 13 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 14 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 15 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 16 and policies and procedures in violation of the California Civil Code and for discrimination in  
 17 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 18 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 19 ROBERT McCARTHY)

20 Assuming, *arguendo*, that Plaintiff was denied access to a place of public  
 21 accommodation, Defendants allege that such exclusion was not unlawful because access could not  
 22 be provided to Plaintiff without causing undue hardship to Defendants.

23 **NINTH AFFIRMATIVE DEFENSE—**

24 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 25 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 26 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 27 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 28 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices

1 and policies and procedures in violation of the California Civil Code and for discrimination in  
 2 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 3 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 4 ROBERT McCARTHY)

5 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility,  
 6 Defendants allege that such exclusion was not unlawful because access could not be provided to  
 7 Plaintiff without fundamentally altering the nature and/or character of the business establishment and  
 8 the goods and services provided therein.

9 **TENTH AFFIRMATIVE DEFENSE—**

10 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 11 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 12 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 13 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 14 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 15 and policies and procedures in violation of the California Civil Code and for discrimination in  
 16 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 17 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 18 ROBERT McCARTHY)

19 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility,  
 20 Defendants allege that such exclusion was not unlawful because barrier removal was not "readily  
 21 achievable."

22 **ELEVENTH AFFIRMATIVE DEFENSE—**

23 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 24 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 25 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 26 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 27 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 28 and policies and procedures in violation of the California Civil Code and for discrimination in



1 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 2 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 3 ROBERT McCARTHY)

4 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility,  
 5 Defendants allege that such exclusion was not unlawful because the facility operated by Defendants  
 6 was not a newly constructed facility nor did it have any alterations, requiring compliance with Title  
 7 III of the American's with Disabilities Act, or Title 24 of the California Code of Regulations, during  
 8 the relevant time frame.

9 **TWELFTH AFFIRMATIVE DEFENSE—**

10 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 11 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 12 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 13 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 14 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 15 and policies and procedures in violation of the California Civil Code and for discrimination in  
 16 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 17 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 18 ROBERT McCARTHY)

19 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility for the  
 20 reasons set forth in paragraph 10 and 11 of the Complaint, Defendants allege that they have no  
 21 liability for any such allegedly unlawful conditions because Defendants do not and have not exerted  
 22 custody and/or control over the parking area, sidewalk or alley. Therefore, the party Defendants are  
 23 improperly joined.

24 **THIRTEENTH AFFIRMATIVE DEFENSE—**

25 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 26 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 27 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 28 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,

1 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 2 and policies and procedures in violation of the California Civil Code and for discrimination in  
 3 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 4 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 5 ROBERT McCARTHY)

6 Assuming, *arguendo*, that the facilities at issue were designed, developed,  
 7 constructed, modified and/or altered in violation of federal and/or California law, Defendants allege  
 8 that all legal requirements for access by disabled persons have been met through the obtaining of  
 9 necessary permits from appropriate legal authorities for the construction, alteration or modification  
 10 of the premises, and that Defendants reasonably relied on the actions of such legal authorities.

11 **FOURTEENTH AFFIRMATIVE DEFENSE—**

12 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 13 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 14 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 15 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 16 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 17 and policies and procedures in violation of the California Civil Code and for discrimination in  
 18 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 19 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 20 ROBERT McCARTHY)

21 Assuming, *arguendo*, that the facilities at issue were designed, developed,  
 22 constructed, modified and/or altered in violation of federal and/or California law, Defendants allege  
 23 that they had no such knowledge.

24 **FIFTEENTH AFFIRMATIVE DEFENSE—**

25 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 26 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 27 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 28 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,

1 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 2 and policies and procedures in violation of the California Civil Code and for discrimination in  
 3 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 4 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 5 ROBERT McCARTHY)

6 Defendants allege that they did not deny Plaintiff full and equal access to goods,  
 7 services, facilities, privileges, advantages or accommodations within a public accommodation  
 8 owned, leased and/or operated by Defendants as required by federal law, including, but not limited  
 9 to the Americans with Disabilities Act and/or California law, including, but not limited to Civil Code  
 10 §§ 51, 52, 54, 54.1, 54.3 and 55.

11 **SIXTEENTH AFFIRMATIVE DEFENSE—**

12 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 13 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 14 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 15 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 16 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 17 and policies and procedures in violation of the California Civil Code and for discrimination in  
 18 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 19 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 20 ROBERT McCARTHY)

21 Defendants allege that they provided Plaintiff with alternative methods for access to  
 22 the facility.

23 **SEVENTEENTH AFFIRMATIVE DEFENSE—**

24 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 25 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 26 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 27 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 28 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices

1 and policies and procedures in violation of the California Civil Code and for discrimination in  
 2 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 3 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 4 ROBERT McCARTHY)

5 Defendants allege that Plaintiff has failed to exhaust the administrative remedies  
 6 available to him.

7 **EIGHTEENTH AFFIRMATIVE DEFENSE—**

8 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 9 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 10 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 11 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 12 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 13 and policies and procedures in violation of the California Civil Code and for discrimination in  
 14 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 15 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 16 ROBERT McCARTHY)

17 Defendants allege that Plaintiff failed to notify Defendants of his need, if any, for  
 18 equivalent service and access or accommodation, and failed to allow Defendants the opportunity to  
 19 provide such.

20 **NINETEENTH AFFIRMATIVE DEFENSE—**

21 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 22 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 23 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 24 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 25 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 26 and policies and procedures in violation of the California Civil Code and for discrimination in  
 27 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 28 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF

1 ROBERT McCARTHY)

2 Defendants allege that the acts or omissions alleged were the proximate result of the  
3 conduct of third persons such that Defendants cannot be held liable for such acts or omissions, and  
4 that said third persons owe a duty to Defendants to indemnify them for any damages, attorney's fees  
5 and/or costs incurred as a result of this litigation.

6 **TWENTIETH AFFIRMATIVE DEFENSE—**

7 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
8 to make alterations in such a manner that the altered portions of the facility are readily accessible  
9 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
10 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
11 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
12 and policies and procedures in violation of the California Civil Code and for discrimination in  
13 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
14 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
15 ROBERT McCARTHY)

16 Defendants allege that the alleged acts or omissions to which Plaintiff refers that form  
17 the basis of Plaintiff's Complaint were done, if at all, in good faith, honestly and without malice and  
18 have not violated any rights Plaintiff may have under federal, state or local laws, regulations or  
19 guidelines.

20 **TWENTY-FIRST AFFIRMATIVE DEFENSE—**

21 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
22 to make alterations in such a manner that the altered portions of the facility are readily accessible  
23 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
24 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
25 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
26 and policies and procedures in violation of the California Civil Code and for discrimination in  
27 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
28 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF

1 ROBERT McCARTHY)

2 Defendants allege that the cost of some or all of the modifications to the subject  
3 properties that Plaintiff seeks to have imposed upon Defendant are disproportionate in terms of the  
4 cost and scope to that of any alterations made within the statutory period, if any.

5 **TWENTY-SECOND AFFIRMATIVE DEFENSE—**

6 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
7 to make alterations in such a manner that the altered portions of the facility are readily accessible  
8 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
9 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
10 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
11 and policies and procedures in violation of the California Civil Code and for discrimination in  
12 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
13 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
14 ROBERT McCARTHY)

15 Defendants allege that they granted Plaintiff access to Defendants' facilities, and if  
16 Plaintiff was in fact excluded from Defendants' facility, any such exclusion was for reasons  
17 rationally related to the services performed and the facilities provided by Defendants.

18 **TWENTY-THIRD AFFIRMATIVE DEFENSE—**

19 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
20 to make alterations in such a manner that the altered portions of the facility are readily accessible  
21 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
22 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
23 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
24 and policies and procedures in violation of the California Civil Code and for discrimination in  
25 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
26 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
27 ROBERT McCARTHY)

28 Defendants allege that they have fulfilled any obligation they may have had to



1 reasonably accommodate Plaintiff's alleged disabilities.

2 **TWENTY-FOURTH AFFIRMATIVE DEFENSE—**

3 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
4 to make alterations in such a manner that the altered portions of the facility are readily accessible  
5 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
6 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
7 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
8 and policies and procedures in violation of the California Civil Code and for discrimination in  
9 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
10 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
11 ROBERT McCARTHY)

12 Defendants allege that any and all actions taken by Defendants, or anyone acting on  
13 their behalf, if any, with respect to Plaintiff or the conditions of the establishment in question, were  
14 for lawful and legitimate, non-discriminatory reasons.

15 **TWENTY-FIFTH AFFIRMATIVE DEFENSE—**

16 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
17 to make alterations in such a manner that the altered portions of the facility are readily accessible  
18 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
19 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
20 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
21 and policies and procedures in violation of the California Civil Code and for discrimination in  
22 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
23 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
24 ROBERT McCARTHY)

25 Defendants allege that the Complaint and each and every cause of action alleged  
26 therein is barred in that at all times relevant hereto, Defendants acted reasonably, in good faith and  
27 without malice, based upon the relevant facts and circumstances known to them at the time they  
28 acted, if at all.



**TWENTY-SIXTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Defendants' services and/or facilities provided to the public are readily accessible to and usable by persons with disabilities as required by California and Federal laws, including, but not limited to, the Americans with Disabilities Act, California Civil Code §§ 51 et seq., California Civil Code §§ 54 et seq. and the California Health and Safety Code Part 5.5.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff was not a true customer of the restaurant, and that Plaintiff was merely a tester engaged in visiting Defendants' facilities in order to ascertain whether there were any purported Americans with Disabilities Act and/or related violations.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Assuming, *arguendo*, that Plaintiff was denied access to the subject facility, Defendants allege that it would be structurally impracticable to design and construct the facility to make it reasonably accessible to people with disabilities.

**TWENTY-NINTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Assuming, *arguendo*, that Plaintiff was denied access to the subject facility, Defendants allege that such exclusion was not unlawful because the facility operated by Defendants was not a newly constructed facility, nor did it have any alterations requiring compliance with any applicable law during the relevant timeframe.

**THIRTIETH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that the prosecution of a representative action on behalf of the general public under California Business and Professions Code §§ 17200 et seq., as applied to the facts and circumstances of this case, would constitute a denial of Defendants' due process rights, both substantive and procedural, in violation of the California Constitution and the Fourteenth Amendment of the United States Constitution.

**THIRTY-FIRST AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff had equal access to the facilities at issue as non-disabled individuals.

**THIRTY-SECOND AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff is not legally entitled to recover any attorneys' fee with regard to this matter.

**THIRTY-THIRD AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff has failed to state facts sufficient to set forth claim(s) for punitive, treble and/or exemplary damages.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to

1 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 2 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 3 and policies and procedures in violation of the California Civil Code and for discrimination in  
 4 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 5 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 6 ROBERT McCARTHY)

7 Defendants allege that Plaintiff has failed to allege special damages with the requisite  
 8 degree of specificity.

9 **THIRTY-FIFTH AFFIRMATIVE DEFENSE—**

10 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 11 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 12 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 13 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 14 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 15 and policies and procedures in violation of the California Civil Code and for discrimination in  
 16 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 17 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 18 ROBERT McCARTHY)

19 Defendants allege that Plaintiff did not exercise due caution or care with respect to  
 20 matters alleged in the Complaint and if, in fact, Plaintiff suffered any damage or injury, Plaintiff  
 21 contributed in whole or in part to such damage or injury, and, therefore, any remedy or recovery to  
 22 which Plaintiff might otherwise be entitled must be denied or reduced accordingly.

23 **THIRTY-SIXTH AFFIRMATIVE DEFENSE—**

24 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 25 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 26 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 27 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 28 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices

1 and policies and procedures in violation of the California Civil Code and for discrimination in  
 2 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 3 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 4 ROBERT McCARTHY)

5 Defendants allege that California Civil Code §§ 54.3 and 55, providing for public  
 6 prosecution and private injunctive relief for violations of Civil Code § 54.1, are to be exclusive and  
 7 damages provided for by Civil Code § 52 are not recoverable for such violations.

8 **THIRTY-SEVENTH AFFIRMATIVE DEFENSE—**

9 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 10 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 11 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 12 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 13 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 14 and policies and procedures in violation of the California Civil Code and for discrimination in  
 15 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 16 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 17 ROBERT McCARTHY)

18 Defendants allege that they owed no duty of care toward Plaintiff.

19 **THIRTY-EIGHTH AFFIRMATIVE DEFENSE—**

20 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 21 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 22 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 23 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 24 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 25 and policies and procedures in violation of the California Civil Code and for discrimination in  
 26 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 27 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 28 ROBERT McCARTHY)



Defendants allege that Plaintiff's alleged injuries and alleged damages, if any, were proximately caused and contributed to by the negligence of Plaintiff.

**THIRTY-NINTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims are barred from any remedy, or certain remedies, under the doctrines of unclean hands.

**FORTIETH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that the provisions Plaintiff relies upon for an award of punitive or exemplary damages, and the substantive rules and procedures and standards for determining the amount and/or whether or not to award such damages, and if so, in what amount, violates the due process and equal protection rights of Defendants under the Constitutions of the United States and

California.

**FORTY-FIRST AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants reserve the right to amend this answer should they later discover facts demonstrating the existence of new and/or additional affirmative defenses, and/or should a change in the law support the inclusion of new and/or additional defenses.

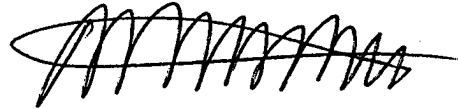
**PRAYER FOR RELIEF**

WHEREFORE, Defendants pray that:

1. Plaintiff take nothing by this action;
2. The Complaint be dismissed with prejudice;
3. Judgment be entered in favor of Defendants and against Plaintiff;
4. Defendants recover their attorneys' fees;
5. Defendants be awarded their costs of suit herein; and
6. Defendants be awarded such other and further relief as the Court deems just

and proper.

Dated: October 22, 2007



Tyler M. Paetkau  
LITTLER MENDELSON  
A Professional Corporation  
Attorneys for Defendants  
JEFFREY A. GIANNINI, ALBERT P.  
GIANNINI, JR., and THE GIANNINI  
LIVING TRUST

## **EXHIBIT C**

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5 Attorneys for Defendants  
JEFFREY A. GIANNINI, ALBERT P. GIANNINI,  
6 JR., and THE GIANNINI LIVING TRUST

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SANTA CLARA

10 ROBERT McCARTHY,

11 Plaintiff,

12 v.

13 JEFFREY A. GIANNINI;  
14 ALBERT P. GIANNINI, JR.;  
THE GIANNINI LIVING TRUST; and  
15 DOES 1 through 10, inclusive,  
16 Defendants

Case No. 107CV093018

**NOTICE TO PLAINTIFF, PLAINTIFF'S  
COUNSEL AND STATE COURT OF  
REMOVAL OF CIVIL ACTION  
PURSUANT TO 28 U.S.C. § 1441(b)  
(FEDERAL QUESTION)**

Judge: Hon. Joseph Huber  
Dept. 8

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18 TO THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SANTA  
19 CLARA, PLAINTIFF ROBERT McCARTHY and PLAINTIFF'S ATTORNEY OF RECORD:

20 PLEASE TAKE NOTICE that Defendants Jeffrey Giannini, Albert Giannini, Jr. and  
21 the Giannini Living Trust have on October 22, 2007 filed a Notice of Removal in the office of the  
22 Clerk of the United States District Court in and for the Northern District of California pursuant to 28  
23 U.S.C. §§ 1331, 1367, 1441(b) and 1446. A true and correct copy of said Notice of Removal and  
24 accompanying exhibits are attached hereto and incorporated herein by reference as Exhibit 1.

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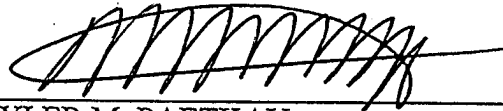
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NOTICE TO PLAINTIFF AND STATE COURT OF REMOVAL

CASE NO. 107CV090439

1 PLEASE TAKE FURTHER NOTICE that, pursuant to 28 U.S.C. § 1446, the filing of said  
2 Notice of Removal of Civil Action with the United States District Court, together with the filing of  
3 said Notice of Removal of Civil Action with this Court, effects the removal of this action, and this  
4 Court may proceed no further unless and until the case is remanded.  
5

6 Dated: October 22, 2007



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8 TYLER M. PAETKAU  
LITTLER MENDELSON  
A Professional Corporation  
Attorneys for Defendants  
JEFFREY A. GIANNINI, ALBERT P.  
GIANNINI, JR. and THE GIANNINI LIVING  
TRUST  
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